Liew Jee Chin v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG 24 OF 1992
RICHARD MALANJUM JC
24 OCTOBER 1992

Criminal Law *— Price Control Act — Failing to display price tags — Breach of Price Control (Indication of Price by Retailer) Order 1977 — Whether it is an offence under the Price Control Act — Whether provisions under the Order were ultra vires — Price Control Act 1946 ss 12, 13, 15 & 22 — Price Control (Indication of Price by Retailer) Order 1977 arts 3 & 5*

Criminal Procedure *— Want of authority of prosecuting officer — Whether power was delegated to him — Whether trial was a nullity — Price Control Act 1946 s 17 — Criminal Procedure Code (FMS Cap 6) ss 380(ii)(b) & 422*

The appellant was carrying on business at Penrissen Road, Kuching when the premises was raided by officers from the Ministry of Domestic Trade and Consumer Affairs. It was discovered that the appellant had failed to display the price tags on 157 rolls of textile materials. The appellant was charged for a breach of arts 3 and 5 of the Price (Indication of Price by Retailer) Order 1977 ('the Order'), an offence under s 22 of the Price Control Act 1946 ('the Act'). The appellant pleaded guilty and was sentenced to pay a fine of RM1,000 in default one month's imprisonment. She appealed against conviction and sentence. On appeal, it was pointed out that as the appellant had pleaded guilty, there could be no appeal against conviction. She raised two preliminary points, firstly, that art 5 of the Order was ultra vires, and that even if the article was intra vires, there was no penalty, as s 22 of the Act did not extend to the Order; and secondly, that the trial was a nullity because of the want of authority of the prosecuting officer.

Held, quashing the conviction and ordering a new trial:

(1) Article 5 was an offence-creating provision in the Order. Although s 13 of the Act does not expressly empower the price controller to make it an offence for non-compliance of the provisions therein, s 40(2)(a) of the Interpretation Acts 1948 and 1967 does. Article 5 was therefore not ultra vires the Act.

(2) The Order should be read as though it was a provision in the Act itself. Where a statute enables an authority to make regulations, a regulation made under the Act became, for the purposes of obedience or disobedience, a provision of the Act. Consequently, in the event of any breach of any of the articles in the Order, it was an offence against or a failure to comply with the provisions of the Act itself and thereby punishable under s 22.

(3) The prosecuting officer was responsible for the enforcement of the Act. He was empowered to prosecute such offences under s 17 of the Act. In this respect, s 380 of the Criminal Procedure Code (FMS Cap 6) did not require strict compliance. The

A appellant was also unable to show that she was prejudiced or that there had been failure of justice by the lack of authority to prosecute given to the prosecuting officer.

(4) In mitigation at the hearing of first instance, the appellant had indicated that she was a tailor and not a retailer. The plea of guilty ought to have been rejected at that stage and the case should have gone to trial.

B

[Bahasa Malaysia summary

Pemohon sedang berniaga di Penrissen Road, Kuching apabila kedainya diserbu oleh pegawai dari Kementrian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna. Telah dijumpai bahawa pemohon telah gagal mempamerkan teg harga pada 157 gulung kain tekstil. Pemohon dituduh kerana melanggar perkara 3 dan 5 di bawah 'Price (Indication of Price of Retailer) Order 1977' ('Aturan itu'), suatu kesalahan di bawah s 22 Akta Kawalan Harga 1946 ('Akta itu'). Pemohon telah mengaku salah dan dihukum membayar denda RM1,000 dan jika tidak dibayar penjara satu bulan. Beliau telah membuat rayuan keatas sabitan dan hukuman itu. Dalam rayuan, ditegaskan bahawa oleh kerana pemohon telah mengaku bersalah, rayuan tidak boleh dibuat atas sabitan itu. Beliau telah menimbulkan dua perkara permulaan, pertamanya, bahawa perkara 5 Aturan itu adalah ultra vires dan walaupun perkara itu ultra vires, tidak ada penalti, kerana s 22 Akta itu tidak merangkumi Aturan itu; dan keduanya, pembicaraan itu batal kerana pegawai pendakwa tidak mempunyai kuasa.

Diputuskan, membatalkan sabitan dan mengarahkan supaya perbicaraan baru diadakan:

(1) Perkara 5 adalah suatu peruntukan di dalam Aturan itu yang mewujudkan kesalahan. Walaupun s 13 Akta itu tidak dengan jelas memberi kuasa kepada 'price controller' untuk membuatnya suatu kesalahan kerana peruntukan di dalamnya tidak dipatuhi, s 40(2)(a) Akta Tafsiran 1948 and 1967 memberi kuasa itu. Oleh itu, perkara 5 tidak ultra vires Akta itu.

(2) Aturan itu harus dibaca seolah-olah suatu peruntukan di dalam Akta itu. Apabila suatu statut membolehkan suatu pihak berkuasa membuat peraturan, suatu peraturan yang dibuat di bawah Akta itu menjadi, untuk tujuan mematuhi atau tidak, suatu peraturan Akta itu. Oleh itu, apabila suatu perkara di dalam Aturan itu dilanggar, ia merupakan suatu kesalahan terhadap atau kegagalan menurut peruntukan Akta itu dan boleh dihukum di bawah s 22.

(3) Pegawai pendakwa bertanggungjawab untuk penguatkuasaan Akta itu. Beliau diberi kuasa untuk mendakwa kesalahan di bawah s 17 Akta itu. Dari segi ini, s 380 Kanun Acara Jenayah (FMS Cap 6) tidak mensyaratkan pematuhan yang tegas. Pemohon juga tidak dapat menunjukkan bahawa beliau telah dimudaratkan atau bahawa terdapat kegagalan keadilan oleh kerana pegawai pendakwa tidak mempunyai kuasa.

(4) Supaya hukuman diringankan, di perbicaraan peringkat pertama, pemohon telah menyatakan bahawa beliau adalah seorang tukang jahit dan bukan seorang peruncit. Akuan bersalah itu sepatutnya ditolak pada peringkat itu dan kes itu sepatutnya dibicarakan.]

Cases referred to

1 *PP v Chu Beow Hin* [1982] 1 MLJ 135 (folld)
2 *Tuck & Sons v Priester* (1887) 19 QBD 629 (refd)
3 *Farrell v Alexander* [1976] 2 All ER 721 (refd)
4 *Re HPC Productions Ltd* [1962] 1 All ER 37 (refd)
5 *PP v Chua Siang Kang* [1960] MLJ 281 (refd)
6 *Madanial Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors* (1962) AIR SC 1543 (refd)
7 *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 (refd)
8 *The Commonwealth v Grunseit* (1943) 67 CLR 58 (refd)
9 *McEldowney v Forde* [1969] 2 All ER 1039 (folld)
10 *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 (folld)
11 *F Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 (folld)
12 *London & Country Commercial Properties Investments Ltd v Attorney-General* [1953] 1 WLR 312 (refd)
13 *Willingale v Norris* [1909] 1 KB 57 (folld)
14 *R v Wicks* [1946] 2 All ER 529 (folld)
15 *Wicks v DPP* [1947] AC 362 (refd)
16 *Rathbone v Bundock* [1962] 2 QB 260; [1962] 2 All ER 257 (refd)
17 *Chung Khiaw Bank Ltd v PP* [1968] 2 MLJ 196 (folld)
18 *Ooi Chin Seng v PP & Anor* [1979] 1 MLJ 267 (folld)
19 *Tara Singh v PP* (1954) 20 MLJ 123 (folld)
20 *PP v KM Basheer Ahmad* [1982] 2 MLJ 78 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 380, 422
Interpretation Acts 1948 and 1967 s 40
Price Control Act 1946 ss 13, 15, 19, 22
Price Control (Indication of Price by Retailer) Order 1977 arts 3, 5

Peter Mijin (*Battenberg & Talma*) for the appellant.
S Selvanathan (Deputy Public Prosecutor) for the respondent.

Richard Malanjum JC: The appellant was charged and convicted on her plea on 27 March 1992. The charge reads as follows:

> Bahawa kamu pada 21 Mac 1992, kira-kira jam 4 petang, di premis no 92, Batu 7, Jalan Penrissen, Kuching, Bahagian Kuching, di dalam Negeri Sarawak, sebagai penjual runcit barang-barang berjadual telah gagal meletakkan tag yang menunjukkan harga bagi tiap-tiap satu unit barang-barang berjadual iaitu:
>
> i) Kain gulung berbagai warna dan jenis — 157 gulung.
>
> di mana barang-barang berkenaan telah dipemerkan untuk jualan di premis tersebut and dengan itu kamu telah melanggar peruntukan Perintah 3(1) Perintah

A Kawalan Harga (Penandaan Harga oleh Penjualruncit) 1977 (Diwartakan melalui PU(A)122 bertarikh 19 Mei 1977) dan kamu telah melakukan kesalahan di bawah Perintah 5, Perintah-Perintah yang sama dan boleh dihukum di bawah s 22(1) Akta Kawalan Harga 1946. (Undang-undang Malaysia, Akta 121 — Disemak 1973).'

B The appellant was sentenced with a fine of RM1,000, in default one month's imprisonment and an order of forfeiture of the 157 rolls of cloth was also made.

The appellant appealed against her conviction and sentence of which the grounds were as stated in her petition of appeal dated 8 June 1992. However, learned counsel for the appellant conceded that the appeal against C conviction could not go on as the appellant had pleaded guilty in the first instance. I did not therefore have to consider the issues raised in the petition of appeal with regards to the conviction of the appellant.

In this appeal, there were two preliminary issues which were subsequently taken up by the learned counsel for the appellant after I intimated that such issues could be considered first.

D The preliminary issues were:

(a) whether any breach of the Price Control (Indication of Price by Retailer) Order 1977 ('the Order') could be made punishable under s 22(1) of the Price Control Act 1946 (Rev 1973) ('the Act'). This is in view of the absence of any clear extended meaning given to the phrases 'this E Act' or 'offence against this Act' in the Act; and
(b) whether the trial was a nullity in view of the want of authority to prosecute on the part of the prosecuting officer.

I dismissed both preliminary issues and stated that I would give my reasons later. I do so now.

F

(1) *The brief facts*

The brief facts as given in the lower court which were admitted as correct by the appellant were that the appellant was carrying on a business at no 92, Mile 7, Penrissen Road, Kuching. On 21 March 1992 at about 4 pm, the G enforcement section of the Ministry of Domestic Trade and Consumer Affairs led by Encik Zainuddin bin Mohd Rehan carried out an inspection at the business premises of the appellant. It was discovered that the appellant had failed to display the price tags on 157 rolls of textiles materials and consequently, the said goods were seized. The appellant was according H charged in court.

(2) *Preliminary issue (a)*

Learned counsel for the appellant submitted on this preliminary issue that:

(a) article 5 of the Order is ultra vires; and
I (b) even if art 5 is intra vires, there is no penalty as s 22(1) of the Act does not extend to any orders made under s 13 or any subsidiary legislations made under the Act.

However, learned counsel for the appellant, though more than sufficient time was given to consider the issue, only managed to submit by way of

comparing provisions of the Act with some of the other statutes of a similar nature and with the phrases 'this Act' or 'offence against this Act'. The statutes he referred to were the Fisheries Act 1985, Immigration Act 1959/63, Customs Act 1967, Control of Supplies Act 1961 (Rev 1973), Exchange Control Act 1953 and the Trade Description Act 1972.

Learned counsel submitted that in those statutes, the meaning of the phrases have been extended to include 'regulations made thereunder' but not in the Act. As such, he submitted that only the actual offences under the Act should be punishable under s 22(1) and not any breach of any subsidiary legislations made pursuant to s 13 or other relevant provisions of the Act. It was also submitted that s 13 did not empower the price controller to create an offence, yet art 5 of the Order did just that.

No doubt it is permissible to refer to other statutes as an extrinsic aid to the construction of a statute but ultimately the intention of Parliament must be ascertained from the actual words in the statute itself.

> In order to ascertain the intention of Parliament, the learned judge has referred to phrases which have been used in other statutes which have fundamentally the same social objectives. In our opinion, that is a safe guide as an extrinsic aid to the construction of a statute, but in the last resort, we think that these statutes turn upon the provisions of the legislation in question and are therefore of relatively little assistance.

per Raja Azlan Shah Ag LP (as His Majesty then was) in *PP v Chu Beow Hin*[1] at p 136.

It was also the submission of learned counsel for the appellant that as s 22(1) involves a penal provision, a strict construction should be adopted. In *Tuck & Sons v Priester*[2] at p 638, Lord Esher MR said:

> We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.

Further down, Lindley LJ in the same case at p 645 said:

> ... the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it ...

But in the case of *Farrell v Alexander*[3] at p 739, Lord Simon said:

> But, in my view, the canon of strict construction of a penal statute is a secondary canon of construction — generally one of the most potent to be applied where there is a real ambiguity in the statutory language. ... Restrictive interpretation of a statutory provision because it has penal consequences is inappropriate where the language has in its context, bearing in mind the statutory objectives, a plain and primary meaning.

(See also: *Re HPC Productions Ltd*[4] and *PP v Chua Siang Kang*.[5])

Subject to the principle of law enunciated in the cases mentioned above, I agree with the submission of the learned counsel for the appellant on the construction of any statutory provision having penal effect.

A In reply to the points raised by the learned counsel for the appellant, learned deputy public prosecutor submitted that art 5 of the Order is superfluous as s 15(d) has provided the offence under the Act for non-compliance of any orders made under s 13. Accordingly, the learned deputy submitted that s 22(1) is therefore applicable. The learned deputy also contended that s 15(d) should be read in place of art 5 as stated in the B charge. Nevertheless, he submitted that such an error in the charge has not occasioned a failure of justice to the appellant and that s 422 of the Criminal Procedure Code (FMS Cap 6) should be invoked.

At this stage, it may be appropriate to reproduce the relevant sections of the Act and the relevant articles of the Order.

C Section 13 provides:

> The Price Controller may, with the approval of the Minister, by order published in the *Gazette* —
>
> (a) declare any goods or classes of goods to be price-controlled goods;
> (b) prohibit, restrict or control the export of any price-controlled goods;
> D (c) prescribe marks or labels to be displayed by retailers, wholesalers, importers, manufacturers and producers relating to any price-controlled goods in such manner as may be specified in the order, indicating the quality, grade, weight, price, place of origin or date of manufacture of such goods or any other information relating to such goods as the Price Controller may require; or
> E (d) prescribe marks or labels to be displayed by retailers, wholesalers, importers, manufacturers and producers relating to any goods or classes of goods in such manner as may be specified in the order, indicating the quality, grade, weight, price, place of origin or date of manufacture of such goods or any other information relating to such goods as the Price Controller may require.

F Section 15 provides:

> It shall be an offence against this Act for any person —
>
> (a) to obstruct any person authorized by this Act to effect an arrest or seize any price-controlled goods or enter and inspect any premises or examine any book, account or other document;
> G (b) to refuse to produce or wilfully delay in producing any book, account or other document or certified copy or translation thereof or to refuse to furnish any information or to furnish false information upon demand being made by a person authorized by this Act;
> (c) to fail, when requested by the Price Controller, the Deputy Price Controller, or any Assistant Price Controller, Chief Price Inspector or Price Inspector, to furnish correctly his name and address; or
> H (d) to fail to comply with any lawful order given under this Act.

Section 22(1) provides:

> Any person, other than a body corporate, but including a director or officer of a body corporate, who commits an offence against, or who fails to comply with, I this Act shall, on conviction, be liable to a fine not exceeding fifteen thousand dollars or to imprisonment for a term not exceeding two years or to both, and for a second or subsequent offence, to a fine not exceeding or subsequent offence, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term of not exceeding five years or to both.

Article 3 of the Order provides:

(1) Every retailer of the goods mentioned in the Schedule shall affix labels, tags or marks on the goods or the bags or containers of such goods which are displayed whether for sale or as samples of goods for sale in the premises of the retailer indicating the price per unit or per unit weight or measure of such goods.

(2) Every retailer of the goods mentioned in the Schedule shall, where the nature of size of the goods is such that it is not practicable to affix labels, tags or marks on such goods or the bags or containers of such goods in accordance with subparagraph (1), maintain and display a list describing the goods so as to be sufficiently identifiable and indicating against such goods the price per unit or per unit weight or measure of the goods

(3) The particulars required by subparagraphs (1) and (2) appearing on such labels, tags, marks or list shall be in Bahasa Malaysia and where the retailer does not read Bahasa Malaysia there shall also be a translation in the language of the retailer.

(4) Such labels, tags, marks or lists shall be of such size and colour so placed as to be sufficiently conspicuous to any person intending to purchase.

Article 5 provides:

> Any person who contravenes or fails to comply with any provision of this Order shall be guilty of an offence against the Price Control Act 1946.

The learned deputy's submission on s 15(d) of the Act was based on the assumption that the word 'order' stated therein refers to any orders as may be made under s 13 or such other enabling sections of the Act. The issue therefore becomes a matter of statutory interpretation.

In relying on s 15(d), the learned deputy contended that the preceding paragraphs of s 15 are not relevant. This may be so in view of the usage of the word 'or' thereby allowing each paragraph to be read disjunctively. But in my view, in order to find the true intention of Parliament for s 15, the ejusdem generis rule of construction should be applied. In the case of *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors*,[6] the Supreme Court of India held 'that the words used in a section must be given their plain grammatical meaning'. Where the court is dealing with two sub-sections of a section, 'it is necessary that the two sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as parts of an integral whole and as being inter-dependent.' It is not legitimate for the court to rewrite the subsections. (See also *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd.*[7])

Accordingly, the first three paras (a), (b) and (c) of s 15 deal with acts or conducts which obstruct or disobey executive functions or orders as allowed under the Act. Therefore, it is my view that the reference to 'lawful order' in para (d) of s 15 should be construed to relate to executive or administrative order. My view is fortified by the provisions in the Act which empower the price controller to give orders not in the nature of orders having legislative effect. Such sections are ss 12(4) and 14(2). It was said by Latham CJ in *The Commonwealth v Grunseit*[8] at p 82 that:

> In the case of orders, some orders would plainly be executive, as, for example, where in pursuance of a power created by legislation a particular person was

A ordered by another person to do a particular thing. The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

(See also the speech of Lord Pearson in *McEldowney v Forde*[9] at p 1065 on B such a distinction.) In the case of *Johnson Tan Han Seng v PP*,[10] such a distinction was indicated in the judgment of Raja Azlan Shah FJ (as His Majesty then was) at p 76 as follows:

> The true distinction therefore, is, between the power to make the law ... which necessarily involves a discretion as to what it shall be, and conferring an authority C or discretion upon the Attorney-General as to its execution, to be exercised under and in pursuance of the law.

In the instant case, s 13 is an enabling section delegating the power to make subsidiary legislation to the price controller. Thus any order made pursuant to s 13 is a subsidiary legislation within the definition provided under s 3 of D the Interpretation Acts 1948 and 1967. Any order made under s 13 is not merely an executive or administrative act but a legislative act with legislative effect. In my view therefore, any order made under s 13 is not within the ambit of the meaning of 'lawful order' in s 15(d). It is also to be noted that the use of the word 'lawful' in s 15(d) describes the nature of the 'order' that may be given. It cannot be an order having legislative effect because a E subsidiary legislation is presumed to be valid until declared invalid by a court. So long as the presumption continues, the subsidiary legislation has to be obeyed. (See *F Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry*.[11]) Thus if the word 'order' in s 15(d) was intended by Parliament to include any such orders made pursuant to s 13, the word 'lawful' would not have been used preceding it.

F I am therefore very much in doubt if Parliament had intended s 15(d) to be the penal provision for breach of any order made under s 13 of the Act. There is also an ambiguity as to the meaning of 'order' in s 15(d) and as such, the interpretation favourable to the appellant should be taken. (See: *London & Country Commercial Properties Investments Ltd v Attorney-General*.[12])

G What is therefore the legal position to art 5 of the order in relation to s 13 and s 22(1) of the Act?

Article 5 no doubt is an offence-creating provision in the Order. Further, s 13 of the Act does not expressly empower the price controller to make it an offence for non-compliance of the provisions of the order made H thereunder. However, in my view, s 40(2)(a) of the Interpretation Acts 1948 and 1967 provides the power. Section 40(2)(a) provides:

> Without prejudice to the generality of sub-section (1) —
>
> (a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit I acts whereby the control or regulation might be evaded.

Accordingly, in my judgment, art 5 of the Order is not ultra vires. Article 5 is only a provision to ensure that the foregoing articles in the Order are not evaded.

The next issue is whether the general penalty under s 22(1) of the Act can be applied in the event of any breach of any of the provisions of the Order.

In the case of *Willingale v Norris*,[13] it was construed and held that where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provision of the statute. That case involved the London Hackney Carriages Act 1843, the London Hackney Carriages Act 1850 and the London Hackney Carriages Act 1853. Section 21 of the 1853 Act provided that the three Acts were to be construed as one Act. By virtue of s 4 of the 1850 Act, certain regulations were made. Section 19 of the 1853 Act provided the general penalty. The question before the Divisional Court was whether a breach of the regulations made under s 4 [of the 1850 Act] was punishable under s 19 of the 1853 Act. It is to be noted that s 19 of the 1853 Act stipulated thus:

> For every *offence against the provisions of this Act* for which no special penalty is herein before appointed, the offender shall be liable to a penalty not exceeding forty shillings ... (Emphasis added.)

None of the Acts provided any clear definition to the phrase 'offence against the provisions of this Act'. However, Lord Alverstone CJ said at p 64:

> If it be said that a regulation is not a provision of an Act, I am of opinion that *R v Walker* (1875) LR 10 QB 355 is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done.

Accordingly it was held in that case that a breach of the regulations made under s 4 was punishable under s 19.

The observations expressed by Lord Alverstone CJ in *Norris*'s case[13] were followed by the Court of Criminal Appeal in the case of *R v Wicks*[14] when Lord Goddard CJ said at p 531:

> The first observation which the court would make is that they are in complete agreement with the decision of the Divisional Court in *Willingale v Norris* [1909] 1 KB 57 that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself.

On appeal to the House of Lords in *Wicks v DPP*,[15] the decision in *Norris*'s case[13] and which was considered by the Court of Criminal Appeal in *Wick*'s case[14] was approved to be perfectly correct.

In the case of *Rathbone v Bundock*[16] there was also a similar issue involved as in the present case. The Divisional Court followed the decisions in *Norris*'s case[13] and in the *Wick*'s case.[14]

In the instant appeal, the question is whether a breach of any provisions in the Order constitutes an offence punishable under s 22(1) of the Act.

Section 22(1) provides the penalty for an offence committed against or failure to comply with the provisions of the Act. However, there is no clear provision defining the meaning of 'this Act' or 'an offence against this Act' in the Act itself. But I find no good reason why the mode of construing a subsidiary legislation made under a statute as adopted in *Norris*'s case[13] and *Wick*'s case[14] should not be applied in this case. Accordingly, in my judgment, the Order should be read as though it is a provision in the Act itself. Consequently, in the event of any breach of any of its articles therein, it is an offence against or a failure to comply with the provisions of the Act itself and thereby punishable under s 22(1) thereof.

(3) *Preliminary issue (b)*

On this second preliminary issue, it was submitted by the learned counsel for the appellant that due to the failure of the prosecution to comply with s 17 of the Act, the appellant was prejudiced. The non-compliance referred to was the want of authority to prosecute on the part of the prosecuting officer. Learned counsel submitted that the appellant was prejudiced as she was 'put to loss'.

In reply, learned deputy public prosecutor submitted that the prosecuting officer in the instant case has the power delegated to him by the price controller to carry out the provisions of the Act including s 17. The learned deputy also relied on s 380(ii)(b) of the Criminal Procedure Code (FMS Cap 6). He further submitted that the failure to tender to the trial court the power to prosecute was curable under s 422 of the Criminal Procedure Code (FMS Cap 6) and that the appellant was not prejudiced as she understood the charge and admitted the facts.

From the brief facts as given and from the notes of proceeding, it is clear that the prosecuting officer namely, Zainuddin bin Mohd Rehan, is a staff of the Ministry of Domestic Trade and Consumers Affairs. He is not a complete stranger to the ministry which is responsible for the enforcement of the Act. Section 17 of the Act reads as follows:

> Prosecution for offences against this Act may be conducted by the Price Controller, the Deputy Price Controller, an Assistant Price Controller, Chief Price Inspector or any police officer not below the rank of Sub-Inspector, or by such other person as the Public Prosecutor, or the Price Controller, with the consent of the Public Prosecutor, may appoint.

Owing to the usage of the word 'may' in s 17, I do not think that it was intended to override s 380(ii)(b) of the Criminal Procedure Code (FMS Cap 6). It is not that specific as requiring strict compliance. (See *Chung Khiaw Bank Ltd v PP*[17] and *Ooi Chin Seng v PP & Anor.*[18]) I hold therefore that s 380(ii)(b) of the Criminal Procedure Code (FMS Cap 6) can be relied upon in the instant case.

Even if I am wrong in holding such a view, I do not think that the appellant was prejudiced as to occasion a failure of justice by the lack of authority to prosecute given to the prosecuting officer in the instant case. (See: *Tara Singh v PP.*[19]) In the case of *PP v KM Basheer Ahmad,*[20] it was held that the lack of authority of the prosecuting officer in prosecuting the case amounted to an illegality and could not be cured by s 422 of the

Criminal Procedure Code (FMS Cap 6). In that case however, the offence was a seizable one whereas in the instant case, it is a non-seizable offence. Further, the issue of prejudice and thereby resulting in a failure of justice was not canvassed in that case and that *Tara Singh*'s case[19] was not brought to the attention of the court.

In the instant case, learned counsel for the appellant could not show that the appellant was prejudiced and that thereby a failure of justice has occasioned. I did not think that the second preliminary issue had any merit and I therefore dismissed it.

(4) *Conclusion*

In the course of his submission on appeal against sentence, the learned counsel for the appellant pointed out that in mitigation, the appellant in fact stated that she was only a tailor and not a retailer. I asked therefore the learned counsel if such a mitigation had traversed the brief facts as given and he agreed, pointing out that the learned magistrate should have rejected the plea of guilty. Learned deputy also agreed that in view of what was stated in mitigation, the plea should have been rejected and that the case should have gone for trial. I agreed with the views expressed by both of them. On the request of the learned counsel for the appellant and with the learned deputy not objecting, I therefore ordered that the conviction and sentence of the appellant be set aside in the exercise of my power of revision under s 325 of the Criminal Procedure Code (FMS Cap 6). I also ordered that the case be heard de novo and that the fine paid to be refunded to the appellant whilst the goods seized would be kept by the investigating officer of this case until the hearing of the retrial.

Order accordingly.

Reported by Mathavan Devadas